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NTSB Order No. EA-3587

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 28th day of May, 1992

BARRY LAMBERT HARRIS,
Acting Administrator,
Federal Aviation Administration,

Complainant,

Docket SE-10255

v.

JOHN ROBERT HAMER,

Respondent.

OPINION AND ORDER

The Administrator has appealed from an initial decision of Administrative Law Judge Joyce Capps, issued orally at the conclusion of an evidentiary hearing held on January 4, 1990.¹ By that decision, the law judge reversed an order of the Administrator suspending respondent's airman certificate for 180 days for alleged violations of sections 91.65(a) and 91.9 of the Federal Aviation Regulations ("FAR," 14 C.F.R. Part 91) stemming

¹An excerpt from the transcript containing the initial decision is attached.

from a mid-air collision that occurred during a formation flight originating at Raleigh-Durham Airport on May 25, 1988.²

In the order of suspension (which served as the complaint), the Administrator alleged the following:

- "1. At all times material herein, you were and are the holder of Commercial Pilot Certificate No. 255682958.
2. On or about May 25, 1988, you operated civil aircraft N737GU, a Cessna 172N, the property of another, on a flight departing in formation with aircraft N44018, a Piper PA-28, from the Raleigh Durham Airport, Raleigh, NC.
3. During the course of the above described flight, during the departure, N737GU collided with aircraft N44018.
4. As a result of the collision described in paragraph 3 above, N737GU and N44018 sustained major damage. The two occupants of N44018 received fatal injuries as a result of the accident."

In the formation flight described above, the Piper was the lead aircraft and respondent, in the Cessna, was the formation's wingman. Shortly after takeoff, respondent lost sight of the Piper, and the collision subsequently occurred approximately two minutes into the flight. The law judge, in reversing the order of suspension, found that respondent had not operated his aircraft in a careless or unreasonable manner and, as a result,

²The pertinent FAR provisions, now recodified at 14 C.F.R. §§ 91.111(a) and 91.13(a), respectively, read as follows:

"§ 91.65 Operating near other aircraft.

(a) No person may operate an aircraft so close to another aircraft as to create a collision hazard.

§ 91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

determined that neither of the FAR violations alleged had been established.

The Administrator has, in his appeal brief, disputed the law judge's finding of a lack of carelessness or unreasonableness on respondent's part. In this regard, he asserts that respondent did not act prudently in his preparation for and his conduct of the flight in question, and contends that respondent could have taken additional steps which would have diminished the likelihood of a mid-air collision with the flight's lead aircraft.³

Respondent has submitted a reply brief in which he urges the Board to affirm the initial decision.

Upon consideration of the briefs of the parties and the entire record, the Board has determined that safety in air commerce or air transportation and the public interest require affirmation of the Administrator's order in its entirety. We will, therefore, grant the Administrator's appeal.

According to the undisputed facts of this case, the flight in question took place at night. Respondent and the two Piper airmen, all of whom were associated with a Petersburg, Virginia fixed base operator, had earlier flown from Petersburg to Raleigh-Durham in the Cessna in order to pick up the Piper,

³The Administrator has also suggested that the occurrence of a collision in and of itself should result in a finding of a violation of FAR § 91.65(a) on a per se basis in cases such as this, where no "outside intervening force" contributes to the collision. Administrator's Br. 8-10. We need not address that question here, however, in view of our finding, infra, that respondent violated § 91.65(a) under the "reasonable pilot standard" applied by the law judge in her initial decision.

which had been left at a Raleigh-Durham facility for radio repairs. The repairs apparently had not been completed, as only one of the Piper's radios was in working order when the pilots arrived at Raleigh-Durham. Nevertheless, they decided to take the Piper back to Petersburg in formation flight with the Cessna. The flight communications plan was for one of the Cessna's radios to monitor air traffic control (ATC) while its other radio was tuned to an air-to-air frequency selected by the pilots. The sole working radio on the Piper was to be tuned to ATC until the flight cleared the Raleigh-Durham Airport Radar Service Area (ARSA), at which time it was to be switched to the air-to-air frequency.

Prior to takeoff, clearances for the formation flight were obtained from clearance delivery by both aircraft. The initial clearance, given to respondent, called for a departure heading of 350 degrees and noted that the departure control frequency would be 132.35. About four minutes later, the Piper obtained a clearance for a departure heading of 90 degrees with a departure control frequency of 125.3. After it discovered that two separate clearances had been given, clearance delivery resolved the matter by communicating to the Piper as follows:

"Ok four four zero one eight what I'm gonna do here is I got both of em put in the system I'm gonna take seven three seven golf uniform with you as a coflight on there out of the system that'll leave ah the correct flight plan for ah you as the primary and ah November seven three seven golf uniform as the secondary zero nine zero heading on departure." (Ex. A-4 at 12.)

Both aircraft took off several minutes later. Respondent took off behind the Piper, and flew behind and to the left of it. Shortly after takeoff, the aircraft made a climbing right turn, and levelled off at an altitude of about 1,500 feet. Respondent has related that, at this point, as he was adjusting his trim tab, the Piper started to pull away and "just go off into the distance."⁴ He also noticed that it began to porpoise as it pulled away from him.⁵ Respondent has further indicated that, while this was happening, local control handed the formation flight off to departure control, and that he unsuccessfully attempted to contact departure control on 132.35.⁶ By that time, the Piper had disappeared from his view.⁷ At that point, respondent felt that it was necessary for him to contact departure control in order to inform both ATC and the crew of the Piper that he had lost sight of the lead aircraft, and to receive appropriate instructions.⁸ Thus, he picked up a card listing

⁴Tr. 239.

⁵Id. 239, 266.

⁶Id. 239-40.

⁷Id. 240. At the hearing, respondent related that the last thing he saw of the Piper before it disappeared from his view was the pulsating light beacon on top of its vertical stabilizer. Id. In addition, he indicated that his aircraft and the Piper were at approximately the same altitude at that time. Id. 273-74. Respondent also testified, variously, that he lost sight of the Piper in the lights of a shopping center (id. 240) and that the Piper was above his sun shield when he last saw it (id. 250-51). Thus, it is uncertain as to whether the Piper was above or below respondent's direct line of vision when it disappeared from his view.

⁸Tr. 240, 245.

ATC frequencies (which had been placed on the seat next to his) and attempted to find the proper departure frequency on it while looking for the Piper at the same time by holding the card in front of him.⁹ Respondent "found a frequency" and was tuning it in when the collision occurred.¹⁰ Between the time the Piper disappeared from respondent's view and the time of the collision,¹¹ he did not alter the course of his aircraft.¹²

Testimony provided by respondent with respect to the pilots' preparation for the flight reveals that they agreed that the Cessna was to be operated at full power while the Piper's power would be cut back so as to allow the Cessna to keep up with it. While the pilots discussed what their course of action would be in the event that the aircraft became separated outside the

⁹Id. 240-41.

¹⁰Id. 241.

¹¹The transcript of the tower tape indicates that just over one minute elapsed from the time the flight was handed off to departure control to the time of the collision. See Ex. A-4 at 19.

¹²Tr. 268. One of respondent's witnesses, who is an expert in aviation accident reconstruction, testified that the two aircraft achieved a maximum separation of 1,700 feet prior to clearing the airport (due primarily to the Piper's superior performance capabilities), after which time the distance between them began to decrease until they ultimately collided. That witness also related that he had found that the aircraft were on approximately the same heading at the time of impact, and that the angle of impact was about 10 degrees. He further noted that he believed that the rate of closure and angle of impact suggested that the Cessna was operating at full power and the Piper was climbing at a 10 degree angle at the time of the accident. Another of respondent's expert witnesses furnished evidence which suggested that the Piper experienced electrical problems prior to the collision.

Raleigh-Durham ARSA, they did not consider what they would do if the aircraft got separated within the ARSA because, according to respondent, "[t]hat was just too close in" for separation to be anticipated.¹³ It is, however, noteworthy that respondent and one of the Piper's pilots previously flew in formation from Raleigh-Durham, and that they had become separated inside the ARSA on that flight.¹⁴

In our view, respondent's flight preparation was flawed. In this regard, we do not believe that it was prudent for him to have dismissed the possibility of a separation of the aircraft inside the ARSA, especially in light of his previous experience with one of the Piper's pilots on a flight originating at the same airport. Indeed, it appears that there was a heightened need for a plan to cover such a contingency since the flight in question was conducted at night and the Piper was operating with only one working radio which would not be tuned to the air-to-air frequency until after the ARSA was cleared.¹⁵

¹³Tr. 228, 260-61.

¹⁴Id. 220. On that previous flight, which took place during daylight, respondent (who was the wingman) and the other pilot communicated over an air-to-air frequency and picked a rendezvous point keyed to a landmark outside the ARSA, which the lead aircraft circled until visual contact with respondent was reestablished. Id. 220-21, 228-29.

¹⁵The Board must also question the wisdom of the pilots' decision to conduct a formation flight with the Piper having only one working radio, as this hampered the ability of its crew to be in simultaneous contact with both ATC and respondent during the entire flight. In our opinion, this factor contributed to the likelihood of a collision between the aircraft once they became separated.

The Board further believes that respondent failed to exercise due care in his operation of the flight in certain respects. First of all, it does not appear that he adequately monitored communications from clearance delivery prior to takeoff. Had he done so, he would have known that the departure control frequency he initially received had been vitiated, and that the proper departure control frequency for the formation flight was 125.3. Such knowledge would have permitted respondent to have tuned to that frequency--rather than the canceled frequency--promptly on handoff. Had he been able to do so, his attention would not have been diverted at the critical juncture in the flight where he lost sight of the lead aircraft. In light of his observation that the Piper had begun porpoising and its subsequent disappearance from his view, it also appears that respondent should have returned to the tower control frequency that he knew--i.e., local control--rather than searching for the proper departure control frequency, in his attempt to inform ATC and the lead aircraft of the situation.¹⁶

In addition, it appears that respondent acted imprudently in continuing on course after losing sight of the lead aircraft. Although there may be some legitimate concern as to the wisdom of

¹⁶While this may not have permitted respondent to have radioed ATC and the Piper simultaneously, an undelayed communication of the problem to the tower via local control would likely have resulted in the rapid forwarding of such information to the Piper. Additionally, it may well have permitted ATC to have given respondent flight instructions that could have reduced the likelihood of a collision.

certificate which was ordered by the Administrator is not unreasonable in view of the lack of due care he demonstrated in creating the hazard which led to the mid-air collision between his aircraft and the formation's lead aircraft. Thus, we believe that the suspension ordered should be reinstated.

ACCORDINGLY, IT IS ORDERED THAT :

1. The Administrator's appeal is granted;
2. The law judge's initial decision is reversed and the Administrator/s order is affirmed; and
3. The 180-day suspension of respondent's airman certificate shall begin 30 days from the date of service of this order.¹⁹

COUGHLIN, Acting Chairman, LAUBER, KOLSTAD, HART, and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

¹⁹For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).